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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 552

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,

Petitioners,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Respondents, appellees below, filed their petition for certiorari in this court on September 4, 1946, No. 463.[1] On September 28, 1946, the Southwestern roads, appellants below, also filed a petition for certiorari.

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[1]Respondents will sometimes be referred to as the Central roads, and petitioners as the Southwestern roads.

The Southwestern roads' petition does not state fairly and clearly the question which the District Court and the Court of Appeals decided against them. We shall compare the petitioners' statement of the matter involved with the allegations of their complaint and with the District Court's statement of the single issue raised by them.

It seems to respondents that much of the discussion in the petition defies understanding. It could scarcely have been made more confusing if it had been designed to make the case appear so utterly complex that a review of the questions involved in No. 463, on which there was substantial disagreement below, would seem to carry with it, automatically, a review of the very different issue involved in No. 552, on which there was complete unanimity below.

We desire to show the Court that the single issue which petitioners tendered in their complaint was whether, on April 1, 1940, as alleged, the respective traffic officers of the two sets of roads deliberately and knowingly entered into an agreement that a certain "division sheet" then being issued by them to govern the division of commercial rates, was also to govern the ownership and allocation of revenues derived from land grant equalization agreements. The District Court heard the testimony of twenty-two witnesses, and received a great volume of documentary evidence. There was no conflict in the evidence on this issue on which petitioners rested their case. The Southwestern roads were unable to produce even one of the many officers alleged to have participated in the making of the alleged contract, who was willing to appear and testify that he had entered, or had ever considered entering, into an agreement settling the controversy over the allocation of *land grant* revenues. It was shown, and the courts below found, that the intent and the whole course of conduct of all the parties denied the existence of the alleged agreement.

The petition is so drawn as to give the impression that the conclusion which this Court is asked to review turned

on the determination of numerous highly technical questions of law. It did not. It was in essence a factual determination of whether there had been such a meeting of minds as to create the alleged agreement with respect to land grant revenues. It was the type of question which is constantly being determined by juries and by courts performing the function of a jury.

Reviewing the record in a long opinion (R. 1660-1731) the District Court held that the contract relied upon by the Southwestern roads had never been made. He found that there was "*no evidence*" (R. 1697) to support the allegation. The Circuit Court of Appeals affirmed, stating as follows:

> "These findings support the decree denying the relief demanded by the plaintiffs and they are abundantly sustained by the evidence. The testimony is voluminous. To review it here would unduly extend this opinion. Further, such a review is unnecessary because the trial court has set it out at length in its opinion.
>
> • • • • •
>
> Here the findings of the court are abundantly supported by competent evidence. *In the proceedings culminating in the issuance of the Division Sheet the parties did not consider land grant rates.*" (R. 1794-5)

In short, petitioners rested their case below on an alleged contract which they were unable to prove; instead, it was affirmatively established that the asserted agreement was not made. The undisputed facts simply forbid belief in the existence of such an agreement. Of the four judges who have participated in the proceedings below, the two opinions show that not one had the slightest doubt concerning this issue. We submit that this clear-cut determination of petitioners' failure to prove the making of an agreement does not warrant review by this Court.

Questions Presented.

We ask the Court to note the single, definitive issue tendered by the Southwestern roads' complaint, and decided against them below. Their case rested entirely on the contention that the parties had made a certain agreement which disposed of this controversy. The opinion of the District Court makes it clear that the decision against the petitioners on that issue rests on no technical definition of terms, or disputable principle of law, but on an overwhelming showing of facts.

The complaint alleges that on April 1, 1940 the officers of the respective roads agreed upon a basis for the division of "joint rates" (Par. IV, R. 7, 8), and that "the said land grant rates over non-land grant, competing or equalizing routes constitute joint rates within the meaning of the contract or agreement described in paragraph IV herein * * *." (Par. V, R. 10)

Petitioners prayed (R. 14) that the court enter judgment declaring:

> (a) the rights and obligations, duties and liabilities of plaintiffs and defendants, and each of them, as to the division or apportionment of the revenue from that Government freight. (R. 14)[1]
>
> (b) that the apportionment or division of revenue from such Government freight moving under joint land grant rates as described in Paragraph VI herein is determined, fixed and controlled by the contract described in Paragraph IV herein * * *; (R. 14-15)
>
> (c) that the provisions in the Central roads' land grant agreements limiting their equalization to the deductions accruing in Central Territory, be declared null and void on the ground that it would require a different apportionment of the revenues from that "agreed to with plaintiffs." (R. 15)

[1]The District Court did resolve the entire controversy as petitioners here prayed, but his decision was against petitioners and their position now is that he had power only to resolve it in their favor.

By their answer respondents denied the making of the alleged contract and asked also that the controversy be resolved. (R. 29-39)

It will be seen that the single ground on which petitioners asked declaratory and injunctive relief, is that the "division sheet" governing the division of commercial rates paid by the public at large is also, by its terms and intendment, an agreement governing the ownership of revenue from land grant traffic. We ask the Court particularly to observe (see subparagraph (c) above) that petitioners' effort to avoid the limitations stated in respondents' equalization agreements, and to prevent the granting of affirmative relief to respondents, likewise rested entirely on the claim that those limitations were contrary to the alleged agreement. Indeed, the record leaves no doubt that petitioners' claim that the controversy had been settled by agreement, was advanced as the only expedient which counsel could devise in their effort to defeat the limitations in the Eastern roads' equalization agreements.

The District Court, stating that "A contract is a deliberate agreement between competent parties to do or to abstain from doing some act" and that "there must be a meeting of the minds of the parties; they must assent to the same thing in the same sense," (R. 1712) held, not merely that the contract had not been proved, but that it had not been made; the Court of Appeals affirmed, and its opinion emphasizes the factual nature of the determination which this Court is asked to review.

ARGUMENT.

This Court is asked to review the holding of the District Court, affirmed by the Circuit Court of Appeals, that the parties had not entered into the contract alleged in the complaint. We respectfully suggest that a unanimous holding of both courts below that the alleged agreement was never made, and, in fact, that not one of the parties had any purpose to make such an agreement, is devoid of the "special and important reasons" (Rule 38) which are a prerequisite to granting the writ, and is not therefore the character of action which this Court will review.

Just before this suit was brought, it was asserted for the first time that three and one-half years earlier the parties had entered into an alleged contract resolving the entire controversy. The undisputed evidence showed that it had never entered the minds of any of the officers who were alleged to have made the contract (Opinion of District Court, R. 1696, 1697) that they had entered into an agreement apportioning land grant revenues, and that respondents' whole course of conduct contradicted the existence of such an agreement. The controversy continued as to every shipment which had moved since the making of the alleged agreement, exactly as before, and no one had ever believed or asserted that the matter had been settled by agreement.

The opinion of the District Court states:

> "There is no evidence that *any of the parties* to Joint Division Sheet No. 200-A intended or understood they were agreeing to a division of 'land grant rates.'" (R. 1697)
>
> "The conference of September 14, 1943, was over three years after the effective date of Division Sheet No. 200-A and to that date the record in this case is

silent of any one on behalf of any road making a claim that Division Sheet No. 200-A constituted a written contract between the eastern and western roads for the settlement of the controversy as to division of land grant rates. Ten days after the conference had adjourned counsel for the plaintiff lines, *for the first time* declared that the subject of land grant rates had been settled by a contract 'Effective April 1, 1940,' Joint Division Sheet 200-A. Is this Court to understand that such an agreement was in existence and yet during all of this period it lay hidden behind the veil of silence and that the extended correspondence and conference after conference between May 29, 1940, and September 14, 1943, was on a subject that had been settled by a binding contract? *To so hold would be to declare a contract in existence that apparently was not recognized by any of the parties to it for a period of years after its execution.*" (R. 1708-09)

The facts which make up the history of this controversy are not in dispute. To show that this petition presents no question of substance, conflict of decision, or doubt which warrants review by this Court, we desire to summarize very briefly the facts which led to counsel's eleventh hour assertion of an agreement. We shall quote below from the opinion and findings of the District Court, and in that connection it should be said that the points relied upon by petitioners on their appeal to the Circuit Court of Appeals (R. 1743-1749) will show that they did not question the accuracy of any of the trial court's statements of fact concerning the history of the controversy and the position of the parties.

Equalization agreements came into existence soon after 1900 (R. 1059, *et seq.*). Until 1934 there was no dispute concerning the proper basis of settlement. Throughout that long period each group of roads bore the deductions accruing from the competitive land grant mileage located in its own territory. "For over thirty years each of the parties to this case, regardless of which were the col-

lecting or settling carrier, *carried* [*i.e.*, absorbed and bore] the land grant deductions in the territory served by it." (Opinion R. 1664)

Petitioners concede that they recognized throughout that long period that the settlements were governed by the terms of the several equalization agreements. The Witness Wilson, Assistant Freight Traffic Manager of respondent Missouri Pacific, testified on cross-examination:

> "Q. When you changed your practice in 1934, following the change in the Eastern Lines' equalization agreements, you recognized at that time, did you not, that the matter of who bears the deduction is determined by equalization agreements, doesn't that follow from what you said?
>
> "A. Well, I should think that is correct." (R. 242)

In their brief in the Circuit Court of Appeals petitioners emphasized this fact, as follows:

> "On page 38 of their brief appellees state that for over thirty years prior to 1934 each of the parties to this case, regardless of which was the collecting or settling carrier, carried the land grant deductions in the territory served by it. Prior to September 1934 the Eastern Lines carried *restrictive exceptions* in their equalization agreements. Therefore, there were not 'wide open' equalization agreements between the two territories." (p. 9)

So much for the situation as it existed prior to September, 1934. At that time the Central roads made certain changes in their equalization agreements. After reviewing the evidence in respect to those changes, the District Court states:

> "Such were the changes, and such were the causes for the changes. Neither related to conditions in Southwestern territory or land grant agreements of plaintiffs or any other western carrier." (R. 1673)

Nevertheless, two of the petitioners immediately took advantage of those changes to depart from the historic basis of

settlement, and to force the Central roads to bear part of the land grant deductions accruing in Southwestern Territory. The District Court states:

> "Basing its action on these changes in land grant agreements by the defendants with the Government, two of the plaintiffs (Missouri Pacific Lines and St. Louis Southwestern Railway) thereupon commenced to pass on to the eastern lines part of the land grant deductions made on the western lines, in cases where they were the collecting carrier. In 1942 the other plaintiff took up the practice, in a general way, in cases where it was the collecting carrier." (R. 1664)

Petitioners' witness explained their reasons for making this change as follows:

> "In 1934, the fall of 1934, they (the Central roads) felt it advisable to amend those agreements *so as to strike out a lot of restrictions and enter into a wide open equalization.* Now, when they did that, *we took the position* that they were a party to the equalization and that, therefore, *the net* rate or the lowest land-grant rate *should be divided on a basis of the commercial divisions.*" (R. 238)

It will be seen that after 1934, as before, petitioners purported to base these settlements on the terms of the equalization agreements.

The Central roads immediately undertook to persuade the two petitioners who had changed their basis of settlement that the changes in the equalization agreements did not warrant the settlements being made by petitioners, and to induce them to go back to the traditional basis of distribution which they had recognized for so many years. That effort was continuous and unremitting over a period of several years. Throughout the entire period of such discussions (reviewed at length in the opinion of the District Court) the two petitioners continued to insist that their action was warranted, not by any alleged divisions agreement between the roads, but only by the

terms of the Central roads' equalization agreement (Opinion, R. 1698), and that they would continue their practice of forcing the Central roads to bear part of the deductions in Southwestern Territory unless and until the Central roads changed their equalization agreements.[1]

The next step is stated in the opinion of the District Court as follows:

> "Unable to settle the dispute by negotiation, defendants [Central roads] served notice in the fall of 1943 that they would cancel their 1934 land grant agreements and submit new land grant agreements worded as to leave no question, that they would only equalize land grant mileage in Central or Official Freight Association territory, *as they had previously been invited to do by one of the plaintiffs.* Whereupon, defendants were informed that in April, 1940, they had made a contract (Joint Division Sheet 200-A) by which they were not only bound to divide land grant rates by the percentages set out in the contract, but that by the contract they had estopped themselves to change their land grant agreement." (R. 1710)

The District Court stated further, as quoted on pages 6

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[1] The following statements of Petitioners are illustrative:

"Up until a few years ago, the C. F. A. carriers did not have on file with the United States Government a wide open equalization agreement and apparently they found they were being penalized in the distribution of traffic and for reasons best known to themselves, filed a wide open equalization agreement * * *." (letter of May 11, 1938, R. 1536)

"There was nothing that compelled your company to file such an agreement other than the desire to participate in Government traffic, which under the land grant act would not be routed via your line, and you have the option of cancelling this agreement any time you do not see fit to abide thereby." (letter of April 18, 1941, R. 1541)

"The signing of this agreement on the part of the Pennsylvania Railroad was purely voluntary and they are, of course, at liberty to cancel this equalization agreement whenever they see fit to do so." (letter of July 8, 1942, R. 1543)

"They feel that the land-grant equalization agreement is binding and that the Eastern lines are obligated thereby to participate with all other lines parties to the agreement in the equalization of the land-grant deductions, *so long as the agreement is in effect.*" (letter of June 16, 1942, R. 1317)

and 7 of this brief, that the claim of contract governing the allocation of land grant revenue was not advanced until September 24, 1943, that for years, and as lately as ten days before, the two petitioners had attempted to justify the basis on which they were distributing this revenue by very different, and very inconsistent claims. The court asked how petitioners could expect him to believe,

> "* * * that such an agreement was in existence and yet during all of this period it lay hidden behind the veil of silence and that the extended correspondence and conference after conference between May 29, 1940, and September 14, 1943, was on a subject that had been settled by a binding contract? *To so hold would be to declare a contract in existence that apparently was not recognized by any of the parties to it for a period of years after its execution.*" (R. 1709)

The whole opinion shows that the primary basis of the holding on this issue in the courts below was *factual*, and therefore presents "no special or important" reasons for review.

In brief, petitioners insisted that they settled on a territorial basis prior to 1934 because the Central roads' equalization agreements contained "restrictive provisions;" that the changes made in the agreements that year permitted a different basis of settlement,[1] and that they would not return to the former practice unless the Central roads entered into new equalization agreements. It was not until the fall of 1943 when the Central saw that their only recourse was to clarify their agreements in such a manner as to prevent no pretense of misconstruction, and took the necessary procedural steps to that end, that one of petitioners' counsel conceived the idea (stated for the first time on September 24, 1943, R. 463) of contending that long before (in April, 1940) the parties had made an agreement which not only resolved the whole controversy, but rendered the new equalization agreements "null and void" (Complaint, subparagraph (c) R. 15). Petitioners now ask this Court to review the un-

[1] The District Court held, to the contrary, that the changes had no such purpose or effect (R. 1676).

equivocal conclusion of both courts below that the alleged agreement was not made.

Reply to Petitioners' Specification of Errors, Petition, Page 9.

The errors asserted in paragraphs numbered 3 and 4 are not discussed by petitioners in their "Reasons for Granting the Writ" to which we reply below.

The Court of Appeals did not hold, as petitioners imply, that the testimony of the traffic officers concerning the facts surrounding the issuance of the division sheet was incompetent. It was highly competent. Furthermore, the District Court declared that the fact that the alleged agreement was not made "was conclusively shown by other evidence"—"aside from and independent of" the evidence to which petitioners objected. (Opinion of District Court, R. 1696, 1697.)

Specific Reply to Petitioners' Reasons For Granting the Writ.

1. (Petition, Page 10.)

In their petition here, as in the courts below, petitioners avoid any discussion of the controlling factual question raised by their claim that the parties had made an agreement to resolve the land grant dispute by distributing the revenues on the basis of the percentages stated in Division Sheet 200-A. The opinion of the District Court states:

> "Plaintiffs, in making their case, aside from offering in evidence Division Sheet No. 200-A, did not choose to go into any matters leading up to and surrounding the formation of that instrument." (R. 1696)

Division Sheet 200-A was issued to effectuate a decision

of the Interstate Commerce Commission fixing the basis for dividing commercial rates, and states, on its face:

> "Issued as result of Opinion and Order of the Interstate Commerce Commission, etc." (R. 75)

The Commission was not even advised on the record before it in that proceeding, that there was any controversy over the distribution of *land grant revenues*, or that land grant equalization agreements were in existence, much less the terms of such agreements. The District Court said:

> "Land grant rates were not before the Commission in any particular in the Division Case. This the parties agree upon. *It made no order for the division of land grant rates. This the parties agree upon.*" (R. 1686)

Petitioners alleged the making of a contract. Their burden was to prove that the minds of the parties met in an agreement to distribute revenues derived from equalization agreements on the same basis as that prescribed by the Commission for commercial rates. That was the decisive issue of fact on which both courts below have found the evidence to be overwhelmingly against petitioners' claim.

2. (Petition, Pages 10 and 11.)

Petitioners refer to rates which are known in the railroad business as "Section 22 quotations." (R. 603) They are so designated because they are specific rates "quoted," or offered, the Government, pursuant to the authority of Section 22 of the Interstate Commerce Act. The basic question here as to what roads equalize, and must bear, particular land grant deductions can never arise in connection with "Section 22 quotations," because such rates, by the specific terms of the "quotation" are not subject to land grant deductions. In contrast to land grant equalization rates, which are created by separate, several agreements between the government and individual roads, Sec-

tion 22 quotations covering service over two or more roads are never made until they have been the subject of discussion and agreement between all the participating roads, which always includes an understanding as to how the revenue shall be divided. (R. 609, 610)

In section 22 quotations the factor as to the location of the competitive land grant mileage out of which the deductions accrue, and the question as to what line has equalized particular deductions is not present, and the roads may agree to divide the revenue by use of the commercial division bases, or they may, and in practice frequently do, agree on some other basis. (R. 612, 613) But if they do not agree, the "quotation" is simply not made. No dispute ever arises, or could arise therefore, as to the distribution of revenue accruing from such rates, and the ownership and distribution of revenue from such rates does not touch even remotely upon the issue here.

3. (Petition, Pages 11 and 12.)

It is stated that: "Petitioners at all times have sought, and now seek, only interpretation and enforcement of the division sheet, not of the Commission's order from which it resulted."

This position was fully understood by the courts below. The opinion of the District Court points out that only ten days before petitioners' counsel conceived the idea of claiming that the parties had entered into a contract resolving the land grant controversy, counsel had insisted, not that any agreement had been made, but that the *order* of the Interstate Commerce Commission in the Southwestern—Official Divisions Case[1] prescribed the basis for allocating land grant revenues. The opinion states:

> "Before the conference, according to its minutes, this counsel expressed his opinion, not that the equalization agreements controlled the division of land grant rates, not that Division Sheet 200-A settled the controversy, but that under the order of the Interstate Commerce Commission in the Official South-

[1] 234 ICC 135 (1939).

> western Division case, 'the carriers must divide land grant rates on the divisional basis prescribed by the Commission in that proceeding.' *No such claim was urged before this Court in this case.*" (R. 1708)

It is argued that the courts below mistakenly believed that they were dealing with "land grant rates" instead of net rates derived through land grant equalization agreements. The opinions show that such a suggestion is frivolous.[1] Net rates created by equalization agreements are universally referred to as "land grant rates." Petitioners' own complaint does so, many times, for illustration see the prayer of the complaint. (R. 14, 15)

In *Nashville Railway* v. *Tennessee,* 262 U. S. 318 (320) the court held only that the railroads could not use rates made under Section 22 as an instrument to create discrimination,[2] and it has no bearing on the issues in this cause.

4. (Petition, Pages 12 and 13.)

We do not believe that the statements made in this section of the petition will either confuse or assist the Court. The opinion of the District Court states clearly the method followed by the Government in computing land grant rates. The court's discussion of the subject begins as follows:

> "The manner of ascertaining land grant rates is not a matter of choice with any carrier, party to a land grant agreement." (R. 1677, 1678)

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[1] It may be noted in this connection that two of the petitioners are land grant roads as well as equalizing roads, and that those roads have distributed the revenue on a basis which actually forced the Central roads to bear a part of petitioners' own statutory deductions. See Opinion, District Court, R. 1711.

[2] Justice Brandeis, speaking for the court, said:

> "Whether this section should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision." (p. 320.)

5. (Petition, Pages 13 and 14.)

For several years petitioners have been trying, by one theory or another, to justify their practice of settling on a basis which forces the Central roads to bear, not only all of the deductions accruing out of the competitive land grant mileage located in Central Territory where the Central roads operate, but also a part of the deductions arising out of land grant mileage in Southwestern Territory where petitioners operate. The contention, rejected by the courts below, that the Central roads agreed to such a basis is simply the latest of several theories which they have advanced and then abandoned. (Opinion, District Court, R. 1707, 1708)

In this section petitioners endeavor to explain away the fundamental immorality or inequity of their effort to force upon the Central roads the burden of bearing a portion of the deductions accruing in the Southwest. They say they have been hurt by such a view of their position. It is because the Central roads have desired to handle Government freight in competition with the land grant mileage in Central Territory, and have been willing to absorb and make their lines "equal" to such mileage, but only to such mileage, that they specifically limit their equalization to the deductions arising in their own territory. For example the equalization agreement of Respondent Baltimore and Ohio, provides:

> "The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252; Ex. E-2, par. 3(d), R. 1255; Ex. F-2, par. 3(d), R. 1259) (The land grant deductions thus specified are all of those accruing in Central Territory in which petitioners operate.)

It is because of exactly the same considerations that the equalization agreement of the connecting road operating in Southwestern territory, Petitioner Missouri Pacific, provides that its "restrictive exceptions * * * shall not operate to restrict [its] equalization *to or from junctions with said Central Freight Association carriers.*" (R. 347)

Through all the years prior to the Fall of 1934 it was not only the language of the equalization agreements, but a recognition of their essential purpose, and the basic equity and fairness of that purpose, that petitioners and respondents alike, bore the land grant deductions in the respective territories in which they operate.

6. (Petition, Pages 14 and 15.)

The alleged agreement is the sole ground on which petitioners sought to defeat the limitations in the Central roads' equalization agreement. (See Complaint, subparagraph (c), R. 15) No one can know the record in this cause and believe that such an agreement was made, and both courts below have held that it was not made. It is not surprising, therefore, that, while in form at least, asking certiorari, petitioners seem to be inviting the Court to treat the case as moot.[1] But petitioners do not take the responsibility of making a specific declaration that the case has been made moot by the repeal of the land grant statute, because they know that it will be years before the interline settlements on this traffic will be completed. This is because the Government's General Accounting Office, which audits the amounts payable under the equalization agreements, is still working on the bills rendered by the railroads in the last quarter of 1944. Moreover, on a great volume of freight

[1] The petition herein, unaccompanied by supporting brief, was filed three weeks after the filing of the petition of the Central roads in No. 463.

moving since 1941, final settlements will be deferred by disputes which have already arisen as to whether the traffic is of such a nature as to be entitled to land grant rates, and therefore, subject to the equalization agreements.

We respectfully ask the Court to deny the writ.

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October 20, 1946.